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Chapter 2: Trusts and Estates

Emil Slizewski

CHAPTER 2

Trusts and Estates

EMIL SLIZEWSKI

§2.1. Wills: Election. In *Maney v. Maney*[1] a testator bequeathed $2500 to his brother, Louis. The will also provided that his "just debts . . . be paid" and that if "any legatee . . . shall contest the admission of this will to probate, then . . . such legatee shall forfeit the legacy herein." Within a year of the appointment of testator's widow as executrix Louis was paid the $2500 legacy; he filed notices of a claim against the estate of $5 million for services rendered; and he brought an action on the claim by a writ with an ad damnum of $5 million. The value of the estate was about $1.5 million.

The Supreme Judicial Court upheld the lower court's dismissal of the executrix' bill in equity to enjoin the prosecution of the action and the claim by Louis. The executrix contended that the doctrine of election was applicable; that the claim, if valid, would completely wipe out the estate of the decedent and necessarily thwart the working of the will; that Louis, by accepting the $2500 legacy, elected to receive the benefits of the legacy rather than pursue his claim.

The Court concluded that the doctrine of election was inapplicable. Louis's claim for services was not inconsistent with his receipt of the legacy. The testator did not manifest an intent that the $2500 legacy be received in satisfaction of a claim or as anything other than an unconditional gift. Pointing out that the trial judge was not bound to find that the claim for services amounted to $5 million simply because that sum was set forth in the writ and the notices of claim, the Court treated "the assertions and admissions of an ad damnum of $5,000,000 as relating only to a purely formal statement of a maximum claim and as not binding upon Louis . . . as establishing the true value of, and recovery upon, the claim, for purposes of this proceeding."[2] There was no proof that the claim would have exhausted the estate.

It is established that if a person shall accept any beneficial interest under a will, he shall be held to confirm every part of the will and cannot set up a claim that will prevent the operation of any part of

EMIL SLIZEWSKI is Professor of Law at Boston College Law School and a member of the Massachusetts Bar.

§2.1. [1] 340 Mass. 350, 164 N.E.2d 146 (1960).
[2] 340 Mass. at 353, 164 N.E.2d at 148.

the will.[3] *Noyes v. Noyes*[4] decided that a legatee who accepted beneficial interests under a will should be enjoined from prosecuting a suit against the estate, the enforcement of which would prevent the operation of the will as to substantial provisions. On the other hand, *Hollister v. Old Colony Trust Co.*[5] and *Turner v. White*[6] refused to apply the doctrine of election when the claims simply tended to diminish the shares of the residuary legatees and not to defeat the specific provisions of the will.

It was argued that the enforcement of the claim in *Maney* would not merely diminish the estate but thwart the operation of any part of the will because recovery on the suit would exhaust the entire estate. But the Court quite properly concluded that the ad damnum in the writ and the amount set forth in the notices of claim did not furnish evidence that the legatee's successful prosecution of his claim would totally deplete the probate assets.[7]

§2.2. Administrator: Fitness. The order of preference for appointment to administer intestate estates appears in a statutory provision.[1] The statutory language makes the question of the competency and suitability of a person petitioning for appointment as administrator as well as the propriety of his appointment largely discretionary with the Probate Court.[2] Lack of suitability is not restricted to physical or mental incapacity but may also include "an unfitness arising out of the situation of the persons in connexion with the estate." [3]

In the case of *Coles v. Goldie*[4] a petition by a husband of an intestate for his appointment as administrator was dismissed on the ground that

[3] Fiduciary Trust Co. v. Mishou, 321 Mass. 615, 75 N.E.2d 3 (1947); Thurlow v. Thurlow, 317 Mass. 126, 56 N.E.2d 902 (1944); Noyes v. Noyes, 224 Mass. 125, 112 N.E. 850 (1916); Watson v. Watson, 128 Mass. 152 (1880); Hyde v. Baldwin, 17 Pick. 303 (Mass. 1835). See also 1959 Ann. Surv. Mass. Law §2.4.

[4] 233 Mass. 55, 123 N.E. 395 (1919); see also Noyes v. Noyes, 224 Mass. 125, 112 N.E. 850 (1916).

[5] 328 Mass. 225, 102 N.E.2d 770 (1952).

[6] 329 Mass. 549, 109 N.E.2d 155 (1952); see also Riley v. Flanagan, 264 Mass. 13, 161 N.E. 796 (1928).

[7] See G.L., c. 231, §87; Jennings v. Bragdon, 289 Mass. 595, 598. 194 N.E. 697, 698 (1935); Clarke v. Taylor, 269 Mass. 335, 336-337, 168 N.E. 806, 807 (1929); Morton v. Clark, 181 Mass. 134, 63 N.E. 409 (1902); Burman & Bolonsky, Inc. v. Luckenbach S.S. Co., 39 F.2d 619 (D. Mass. 1930).

§2.2. [1] G.L., c. 193, §1, which provides in part: "Administration of the estate of a deceased intestate shall be granted to one or more of the persons hereinafter mentioned and in the order named, if competent and suitable for the discharge of the trust and willing to undertake it, unless the court deems it proper to appoint some other person:

"First, the widow, or surviving husband of the deceased.

"Second, the next of kin or their guardians or conservators as the court shall determine. . . ."

[2] See Morgan v. Morgan, 267 Mass. 388, 392, 166 N.E. 747, 748 (1929); 1 Newhall, Settlement of Estates §47 (4th ed. 1958).

[3] Comstock v. Bowles, 295 Mass. 250, 260, 3 N.E.2d 817, 823 (1936); see also Quincy Trust Co. v. Taylor, 317 Mass. 195, 196, 57 N.E.2d 573, 574 (1944); Morgan v. Morgan, 267 Mass. 388, 392, 166 N.E. 747, 748 (1929).

[4] 1960 Mass. Adv. Sh. 891, 167 N.E.2d 761.

he was not a suitable and competent person. He failed to disclose information that a woman listed in the petition as a sister of the decedent was really her illegitimate daughter. The dismissal of this petition and the appointment of the daughter was upheld as being within the proper discretion of the court. The case is somewhat similar to *O'Sullivan v. Palmer,*[5] in which an administrator's appointment was revoked because he did not list all the heirs known to him or give notice to those who were not listed.

§2.3. Appointment of debtor as executor. *Barnes v. Lee Savings Bank*[1] reaffirmed the principle of law that "when a debtor of an estate is appointed administrator or executor of his creditor, the debt is extinguished and is treated as paid. The debt becomes part of the assets of the estate and the administrator or executor must account for the amount of such indebtedness."[2] The Supreme Judicial Court concluded that a mortgage given by the debtor to the decedent was discharged when the debtor, who was the sole beneficiary under the will, was appointed executor. The net result was to prefer a mortgagee junior to the testator.

Although the rule is said to be based upon convenience and the inability of a personal representative to bring suit against himself,[3] it should not be applied in such a way as to work an injustice.[4] Ordinarily, the discharge of a mortgage on property of the debtor to the advantage of other creditors would ostensibly be the type of situation that would be beyond the scope of the rule. In *Barnes,* however, the debtor was the sole legatee and it did not appear that the decedent had any creditors.

§2.4. Appraisers: Compensation and expenses. It is customary for lawyers representing decedents' estates in probate proceedings to suggest as appraisers of the inventory items those who have no special qualifications to make property appraisals.[1] Since the inventory's function is to provide a starting point for future probate accounting[2] and its stated values are not conclusive as to persons interested in the estate or as to state and federal tax collectors,[3] the activities of the

5 312 Mass. 240, 44 N.E.2d 958 (1942).

§2.3. 1 340 Mass. 87, 162 N.E.2d 666 (1959), also noted in §9.2 *infra.*

2 340 Mass. at 90, 162 N.E.2d at 668.

3 Sullivan v. Sullivan, 335 Mass. 268, 271-272, 139 N.E.2d 510, 513-514 (1957), noted in 1957 Ann. Surv. Mass. Law §12.3; Argus v. Kokkorou, 308 Mass. 315, 318, 32 N.E.2d 211, 213 (1941); Bassett v. Fidelity and Deposit Co., 184 Mass. 210, 212-213, 68 N.E. 205, 206 (1903).

4 Kinney v. Ensign, 18 Pick. 232, 236 (Mass. 1836).

§2.4. 1 It is also customary for the Probate Court to appoint the suggested appraisers. However, in Mulcahy v. Boynton, 1960 Mass. Adv. Sh. 879, 167 N.E.2d 867, the register struck out one of the appraisers suggested and inserted the name of another, but this action was not the subject of controversy.

2 See Hutchinson v. King, 339 Mass. 41, 45, 157 N.E.2d 525, 527-528 (1959), noted in 1959 Ann. Surv. Mass. Law §2.6; 2 Newhall, Settlement of Estates §§274, 278, 279 (4th ed. 1958).

3 Inheritance and estate tax valuation regulations may call for valuations by specialists if the property is other than cash or securities with a readily ascertainable

probate appraisers are often substantially clerical only. Expert or not, these appraisers are entitled to compensation for their services, the amount of which is subject to determination by the Probate Courts.[4]

Mulcahy v. Boynton,[5] decided during the 1960 SURVEY year, reduced the compensation that the Probate Court approved for one of three appraisers from $175 to $60 when the estate was appraised at approximately $175,000. The Supreme Judicial Court said:

> In the light of the routine duties and of the fact that the petitioner had, and needed, no specialized knowledge qualifying him to appraise any unusual property, we think the rule of thumb proposed by [executor's counsel] of distributing one tenth of one per cent of the total value of the estate among the three appraisers was fair compensation. We, of course, do not suggest that an expert appraiser with specialized qualifications to appraise for taxation property of an unusual character would not be entitled in an appropriate case to compensation for special work reflecting his training and expert knowledge.[6]

The Court also held that it was error for the Probate Judge to allow $100 for the services and expenses of the appraiser's counsel. There was no justification for payment of counsel fees out of the estate when the services rendered afforded no benefit to the estate but sought to obtain an excessively large fee for the appraiser.[7]

§2.5. Guardianship: Compensation of attorney. When a lawyer renders services material to the welfare of a ward and these services are contracted for by a guardian, the lawyer is entitled to an order for compensation from the estate of the ward to the extent of the reasonable value of his services.[1] In *Hallett v. Oakes*[2] an attorney, who unsuccessfully prosecuted a writ of habeas corpus to obtain the release of an insane person from an asylum before a guardian was appointed, was held entitled to recover a reasonable compensation for services regarded in the light of necessaries.

An attorney whose efficiency and persistence brought about the release of a person committed as insane, despite the refusal of the

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market value. Estate attorneys, therefore, often make appraisals by those of special skills available to the probate appraisers or may seek to have experts appointed as such appraisers when tax valuations may be critical.

4 G.L., c. 215, §39.

5 1960 Mass. Adv. Sh. 879, 167 N.E.2d 867.

6 1960 Mass. Adv. Sh. at 884, 167 N.E.2d at 871.

7 See Miller v. Stern, 326 Mass. 296, 303-304, 93 N.E.2d 815, 819 (1950); 1 Newhall, Settlement of Estates §§32, 33 (4th ed. 1958); 1957 Ann. Surv. Mass. Law §12.4.

§2.5. 1 See G.L., c. 215, §§39, 39A; id., c. 201, §37; Tomlinson v. Flanagan, 287 Mass. 38, 44-45, 190 N.E. 785, 787 (1934); 2 Newhall, Settlement of Estates §392 (4th ed. 1958).

2 1 Cush. 296 (Mass. 1848).

guardian and the Probate Court to permit the expenditure of guardianship funds to pay for a psychiatric examination on the ground that such expenditure would be "fruitless," was held entitled to the reasonable value of his services and expenses in the case of *Hale v. Gravallese*.[3] Since his efforts were requested by the ward and were substantially beneficial to the ward, he could not be placed in the role of an officious volunteer.

In the *Hale* case the lawyer also sought added compensation for services rendered on a second degree murder indictment against the ward. These services were apparently contracted for by the guardian and led to the acceptance of a plea of nolo contendere and the placing of the accused on probation for two years. The Court held that the attorney was entitled to the reasonable value of these services but reduced the amount sought.[4]

The claims for services with regard to both the criminal matter and the release of the ward from confinement as an insane person could ordinarily be satisfied out of the estate in guardianship.[5] However, in *Hale* the funds held by the guardian came into being from veteran pension payments from the federal government. Such payments are by statute exempt "from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." [6] Since there was no evidence as to the nature and form of the corpus of the guardianship estate the Court directed that further facts be reported. If the pension payments were invested in another form they would then lose their exempt status.[7]

Subsequently, the judge of the Probate Court reported that it had been the custom of the guardian to cash the checks received as the pension payments, and, after paying bills of the ward, to deposit the balance in a savings bank in the name of the guardian. The guardian withdrew sums from this account to invest in United States Savings Bonds. The Court ruled that neither the savings account nor the

3 340 Mass. 96, 162 N.E.2d 817 (1959).

4 Counsel sought $5000 and the Court allowed $3000. Some 34 years elapsed between the date of indictment and the acceptance of the plea of nolo contendere. The Court stated: "[The attorney] entered his appearance for the defendant and prepared the case for trial. He arranged with the district attorney for a favorable disposal of the indictment and within a short time brought the prosecution to an end. We are not disposed to minimize the value of these services, but experience leads us to doubt whether in the circumstances great difficulty was encountered in prevailing upon the district attorney to conclude the prosecution. It does not appear whether in fact the murder could then have been proved. Having in mind that the maximum compensation allowed an attorney who is assigned to defend a first degree murder case is $1000 [Rule 95 of the Superior Court (1954)] and considering the financial condition of the ward, [the guardian held funds approximately in the amount of $20,000] we think that the award for defending against the indictment for second degree murder should be not more than $3,000." 340 Mass. at 101, 162 N.E.2d at 820-821.

5 See authorities cited in note 1 *supra*.

6 71 Stat. 121, 38 U.S.C. §3101 (1958), formerly 38 U.S.C. §454a (1952).

7 Carrier v. Bryant, 306 U.S. 545, 59 Sup. Ct. 707, 83 L. Ed. 976 (1939).

bonds were exempt from being applied by the guardian in satisfaction of the attorney's claim.[8]

§2.6. Short statute of limitations: Recovery of taxes. General Laws, c. 197, §9,[1] the short statute of limitations, by its terms bars only claims of creditors of the deceased. It has been held inapplicable to an action to recover a tax assessed againt an executrix upon the personal estate of her testatrix.[2] But, when a tax is assessed to a decedent, its collection may be barred by the short statute of limitations.[3]

Town of Milford v. Casamassa[4] decided that real estate taxes relieved under the exemption provided by G.L., c. 59, §5[5] could be recovered by a town in an action of contract brought under G.L., c. 59, §5A,[6] more than one year after the appointment of an administratrix of the estate of the deceased real estate owner. The Court concluded that the provision of the final sentence of Section 5A that the "collector shall present the claim for payment in the same manner as provided for presentation of claims of creditors of the estate and have like power to bring suit thereon" did not remit the tax collector to the remedies available to the creditor who became such during the decedent's life. The purpose of the provision was to give him the remedies ordinarily given to one who acquired a claim against the estate arising after the decedent's death.

The Court reasoned that:

> Section 5A requires payment of the amount of the taxes of which the decedent was "relieved" only if the estate exceeds, among other items, the decedent's "debts." The first sentence of §5A thus in

[8] Hale v. Gravallese, 340 Mass. 722, 166 N.E.2d 557 (1960).

§2.6. [1] The section provides in part: ". . . an . . . administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond . . ."

[2] Dallinger v. Davis, 149 Mass. 62, 20 N.E. 696 (1889).

[3] Bartlett v. Tufts, 241 Mass. 96, 134 N.E. 630 (1922); Rich v. Tuckerman, 121 Mass. 222 (1876).

[4] 339 Mass. 702, 162 N.E.2d 284 (1959).

[5] Clause Eighteenth exempts from local taxation: "Subject to section five A, the polls and any portion of the estates of persons who by reason of age, infirmity and poverty are in the judgement of the assessors unable to contribute fully toward the public charges."

[6] Section 5A reads as follows: "In the event that a person is relieved of taxation under any provision of clause Seventeenth or of clause Eighteenth of section five, upon his death his estate, to the extent that it exceeds his debts, reasonable funeral and burial expenses and reasonable expenses of administration, shall be chargeable with the amount of taxes from which he is so relieved with interest at the rate of six per cent per annum from the date of his death. His estate shall be so chargeable notwithstanding the time when such taxes were assessed; provided however, that they were assessed on or after January first, nineteen hundred and forty-two. The assessors shall annually compute the amount of such taxes, record the same and, upon the death of the person relieved, commit the aggregate amount to the collector upon a special warrant, and such collector shall present the claim for payment in the same manner as provided for presentation of claims of creditors of the estate and have like power to bring suit thereon."

by a successor trustee. The only person who has a present vested interest in the trust property is not disqualified from so assenting. The Court ruled that there was no basis for finding that the bank was unsuitable to act as single trustee or that it could not deal fairly with all beneficiaries.

§2.9. Trust accounting: Guardian ad litem. In 1958, the case of *In re Claflin*[1] decided that a testamentary trustee represented all of the beneficiaries of the trust and that a guardian ad litem should not have been appointed in a proceeding involving the allowance of the executors' accounts. The Court then stated: "The trustee's duty to account is the feature which is of the greatest practical importance here. When the time comes for the allowance of a trustee's account, minors and unborn and unascertained persons who are or may become beneficiaries under the trust will have the protection of a guardian ad litem." [2]

Following the decision of *Claflin,* the executors' final account, which showed a complete distribution of the estate, was allowed without any notice given to the beneficiaries of the trust. Four accounts were later filed by the trustee and a guardian ad litem was appointed to represent minor beneficiaries and persons unborn and unascertained in the matter of their allowance. A request by the guardian ad litem to inspect income, estate, and inheritance tax returns of the estate and vouchers in support of their accounts was declined by the executors on the grounds that the accounts had been finally adjudicated and that the duty of the guardian ad litem did not require or authorize him to consider these documents. The trustee notified the guardian ad litem that it was kept informed of all major administration items and that it had examined the accounts and vouchers of the executors to a sufficient extent to determine that the items were proper and that the share distributed to the trust was accurately ascertained.

The guardian ad litem objected to the allowance of the accounts, stating that without the vouchers and tax returns he could not determine whether the trustee was negligent in permitting the allowance of the executor's accounts without objection; that a perusal of these documents was required for the adequate representation of the interests of minors and unborn and unascertained persons.

In *Second Bank-State Street Trust Co. v. Linsley,*[3] the Supreme Judicial Court indicated that if an investigation of the executors' vouchers and tax returns was sought to show nothing but negligence, it would not be justified.[4] It was recognized that not only the trustee's adminis-

§2.9. 1 336 Mass. 578, 146 N.E.2d 914 (1958), noted in 1958 Ann. Surv. Mass. Law §2.2.

2 336 Mass. at 584, 146 N.E.2d at 917.

3 1960 Mass. Adv. Sh. 811, 167 N.E.2d 624.

4 The word "indicated" is used advisedly. The guardian ad litem subpoenaed the executors to produce the vouchers and tax returns. The trustee and the executors filed a petition to quash the subpoenas and the Probate Court reserved and reported the petition to the Supreme Judicial Court.

The Supreme Judicial Court dismissed the report because of lack of jurisdiction on the part of the Probate Court to reserve and report such a case. G.L., c. 215, §13,

tration of the trust but also the trustee's duty to acquire from the executors all the property to which the trust was entitled was involved in the allowance of the trustee's account. The Court, however, remarked:

> Once it should appear to him that there has been reasonable investigation by the trustee, a heavy burden will descend upon him to justify further expenditure of his time. Nevertheless the circumstances do not operate as a rule of law to interpose a complete bar to a reasonable performance of a part of his duties.
>
> Where there have been previous decrees on the executors' accounts, the amount of time which may be needfully spent by the guardian ad litem is a subject for close scrutiny. This observation is most pertinent here where the will contains an exculpatory clause which provides: "No executor . . . or trustee shall be liable for any error in judgement or for anything except his . . . or its own individual wilful misconduct." The guardian ad litem in his report states that his object is "to determine whether the trustee of the testamentary trust was negligent." Proof of negligence would not be proof of wilful misconduct.[5]

If the guardian ad litem were allowed to make the investigation he sought to make without any suspicion of a basis for surcharge, it would tend to subvert the policy behind the statute that makes a final decree entered on a probate account unimpeachable except for fraud or manifest error.[6] After allowance of the accounts of the trustee involved in the *Linsley* case, it would appear that a substantial degree of finality should attach to the decree and subsequent guardians ad litem appointed in subsequent accountings by the same trustee ought not review the performance of the first guardian ad litem in the absence of suspicion of neglect of duties, fraud, or manifest error. It should make no difference that the final account of the executors was allowed without a guardian ad litem having been appointed because the *Claflin* case had already decided that the trustee properly represented the beneficiaries and no guardian should have been appointed.

One cannot help but commiserate with the guardian ad litem in *Linsley* because he appeared to seek to do that which the Court in the *Claflin* case implied would be required of him.[7]

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limits the power to reserve and report to cases in two classes: cases in which interlocutory decrees or orders had been made and cases that had been heard for final determination. This case came within neither class.

5 1960 Mass. Adv. Sh. 811, 814-815, 167 N.E.2d 624, 626-627.

6 G.L., c. 206, §24.

7 "For allowance of the executors' account reliance can safely be placed upon the responsibility of the trustee. No need here appears for the appointment of a guardian ad litem to duplicate the work of the trustee, *a fiduciary of at least equal dignity having itself an obligation to account. The trustee's duty to account is the feature which is of the greatest practical importance here.* When the time comes for the allowance of a trustee's account, minors and unborn and unascertained persons who are or may become beneficiaries under the trust will have the protection of a guardian ad litem." (Emphasis added.) 336 Mass. 578, 584, 146 N.E.2d 914, 917 (1958).

§2.10. Apportionment of trust income. When property is settled in trust to pay the income to a person for life and on his death to pay the principal to another, the income that has been received by the trustee or that has accrued before the life beneficiary dies and has not been paid to him must be paid to his personal representatives unless the trust provides otherwise.[1] *National Shawmut Bank of Boston v. Morey*,[2] referring to the Massachusetts apportionment statute, G.L., c. 197, §27, said:

> Doubtless it was thought to be more just and probably also in most instances more nearly consistent with the real desires of the testator or the person creating the right that the beneficiary should have the income up to the moment of termination of his estate rather than that he should be deprived of income upon which he may have been relying for a period while the estate was still his, which might be long, if termination should occur immediately before a payment date. In order to avoid the statute an intent to provide "otherwise" should appear with substantial clarity. It is not enough merely to say that without any statute the will or instrument would not be construed as providing for apportionment.[3]

The question of whether a will expressed a testator's intent to avoid apportionment of accrued and accumulated income arose in the case of *Loring v. Cotter*.[4] The fifth clause of the will bequeathed a sum of money to trustees to pay the income to the testator's wife for life "and on her death, [to] pay over the principal fund with any accumulations of income and additions thereto to [a school]." The will created two other trusts for the wife of the testator with gifts over on her death. These two trusts did not contain any language to the effect that income accumulations and additions were to pass to the corpus beneficiaries when the life estates terminated. The Supreme Judicial Court decided that with respect to the trust created by the fifth clause the trustees were to pay over to the school (1) accumulated net income in their possession, (2) interest accrued on bonds to the date of death of the life beneficiary and received by the trustees after that date, and (3) dividends declared to stock of record prior to the date of death of the life beneficiary but paid after that date.

Admitting that the question is not free from difficulty, the Court thought that the entire will evinced an intent to depart from the ordinary rule of apportionment. Relying upon the canon of construction that every word of a will be given a meaning if possible, the argument that the phrase "and on her death, pay over the principal fund with

§2.10. 1 1 Restatement of Trusts Second §235A; 3 Scott, Trusts §235A (2d ed. 1956). General Laws, c. 197, §27, provides: "A person entitled to an annuity, rent, interest or income, or his representative, shall have the same apportioned if his right or estate therein terminates between the days upon which it is payable, unless otherwise provided in the will or instrument by which it was created."

2 301 Mass. 37, 16 N.E.2d 2 (1938).

3 301 Mass. at 39, 16 N.E.2d at 3.

4 339 Mass. 689, 162 N.E.2d 294 (1959).

any accumulations of income and additions thereto" referred to the period between the death of the life beneficiary and ultimate distribution was rejected. Such an interpretation would have made the phrase superfluous, since the rule of apportionment would cause any income accruing or accumulating after the death of the income beneficiary to go to the corpus beneficiary.

There are several cases in other states deciding that accrued and accumulated income should go to the personal representative of the income beneficiary when the language of trusts was similar to that contained in the fifth clause of the will in the *Loring* case.[5] Much can be said for this approach. The income is given to the life beneficiary and becomes her absolute property. The trustees cannot refuse to pay it to her and decide to accumulate it and convert it into corpus. The testator did not give the trustees the discretion to withhold income from the income beneficiary and to give it to the remainderman: he gave the income to his wife absolutely.[6]

In *Loring,* however, the construction of the phrase in the fifth clause of the will appears to be defensible in view of the omission of similar language introducing the gifts of the principal in the other two trusts created by the same instrument.

In *Thorndike v. Dexter,*[7] also decided during the 1960 SURVEY year, a will left the residue of the estate in trust with a direction for the payment of the income "quarterly, or oftener if convenient, to my daughters living at the time of such payment." There were alternative contingent gifts over on the death of one or both daughters.

The testator died on August 26, 1956, at which time a tort action was pending against him and a new action was brought against his executors after his death. The amount claimed in each action exceeded the value of the estate and two notices of claim were filed in the Probate Court. In July, 1957, the time for filing claims against the estate was extended, and in September, 1957, a petition was filed for a decree ordering the executors to retain all of the assets of the estate in their hands. In April, 1958, the two tort actions terminated favorably for the estate, and the petition to retain assets was dismissed.

One of the testator's two daughters died on May 31, 1958. The executors at that time held a substantial amount of income including interest accrued on bonds, interest on a capital interest in a firm, and dividends on stock, unpaid but declared. The Probate Court decreed that the deceased daughter's personal representatives were entitled to one-half of the net income that had accrued to the testator's executors before May 31, 1958. On appeal the Supreme Judicial Court modified this decree by directing that one-half of the net income available for distribution before May 26, 1958, be paid to the executors of the deceased daughter.

[5] See 3 Scott, Trusts §235A (2d ed. 1956), and cases cited in note 10.

[6] See Commercial Trust Co. of New Jersey v. Spiegelberg, 117 N.J. Eq. 171, 175 Atl. 164 (1934).

[7] 340 Mass. 387, 164 N.E.2d 338 (1960).

After having observed that the testator avoided the application of G.L., c. 197, §27, by providing for payments to "daughters living at the time of such payment," the Court stated: "We do not, however, find an intent that, whatever the cause and length of the delay, the income shall be paid only to the beneficiaries living at the time when payment is made." [8] An unforeseen delay prevented the quarterly payments from being made for a substantial period of time. Were it not for these extraordinary circumstances, the deceased daughter would have received one-half of all the income available for distribution on or before May 26, 1958. May 26 was substituted for the May 31 date set out in the decree of the lower court in order to have the quarters measured from August 26, 1956, the date of the testator's death.[9]

The Court directed that the net funds in the hands of the executors payable as income on May 26, 1958, were to be deemed funds then payable as though held by the trustees, and cash received after May 26 on items then accrued and payable that were equivalent to cash on hand, such as overdue coupons on bearer bonds, was to be accounted for as though on hand on that date.

In *Thorndike v. Dexter* it seems clear that the testator intended to limit the income beneficiaries to only the daughters or daughter alive at the time the payments were actually made, and in this aspect the case is somewhat similar to *Dolbeare v. Kirby*.[10] The latter case considered the mode of distribution of a residuary estate that was given "in equal shares to [certain named persons] or to those of them as shall be living at the time the property is divided." Concluding that the estate of one of the named persons who died before actual distribution was not entitled to take, the observation was made: "A testatrix might wish to make a gift to designated beneficiaries only in case they could receive it personally. In this case apt words were used to express such an intent." [11]

Dolbeare further resembles *Thorndike* in that the distribution of the estate was delayed for more than four years after testatrix' death because of litigation. But the *Thorndike* case involved a trust that required that the income be paid at least quarterly to designated beneficiaries while they were alive and the deprivation of these beneficiaries of income for several quarters after the donor's death would appear to conflict with his intended dispositive scheme. In the *Dolbeare* case the testatrix expressed her desire to benefit only those living at the date of distribution of the residue.

§2.11. Relinquishment of trustee's power. An attempted relinquishment of a power by a co-trustee was declared to be of no legal effect in the case of *Sherry v. Little*.[1] There, the testator created two trusts in which he gave his widow substantial beneficial interests with

8 340 Mass. at 389, 164 N.E.2d at 340.
9 See Minot v. Amory, 2 Cush. 377 (Mass. 1848).
10 265 Mass. 259, 163 N.E. 899 (1928).
11 265 Mass. at 261, 163 N.E. at 899.

§2.11. 1 1960 Mass. Adv. Sh. 935, 167 N.E.2d 872.

remainders over to his daughters and their issue. He named his widow and a Mary E. Little co-executrices and co-trustees. The two fiduciaries were granted the usual powers and certain special powers one of which read: "If co-executors or co-trustees disagree while my wife is an executor or trustee then her decision shall control except as to powers expressly delegated to others than herself." The major portion of the estate consisted of stock in closely held corporations.

The widow and Mary Little executed a written agreement that recited that Mary deemed that the possible exercise of the controlling power by the widow might result in decisions contrary to Mary's understanding as to her duties as a fiduciary and contrary to the best interests of the estate and the trusts, that Mary contemplated resigning, that the widow believed that the trust would be more efficiently administered if both fiduciaries had equal powers, that the widow released her power to have the controlling decision in case of disagreement, and that Mary agreed to continue to serve as a co-fiduciary.

The Court found the agreement to be invalid because it sought to abrogate a power that was an intregal part of the testator's estate plan. Since both executrices accepted the trust they were bound to administer it according to the express terms of the testator's will.

There are limited circumstances in which a trustee may deviate from a term of the trust in case of an emergency.[2] The *Sherry* case, however, presented no evidence of impending necessity or of material changes in circumstances not anticipated by the testator. The controlling power of decision given the widow was an administrative power and as such appears to be beyond the purview of G.L., c. 204, §27, permitting the complete or partial release of a power of appointment.[3]

§2.12. Charitable trusts: Cy pres. Benjamin Franklin died in 1790 testate leaving 1000 pounds sterling in trust to the inhabitants of Boston.[1] The trustees were to let out the fund upon interest to young

[2] See 1 Restatement of Trusts Second §167(2). Comment *e* provides: "If owing to circumstances not known to the settlor and not anticipated by him, to comply with the terms of the trust would defeat or substantially impair the purposes of the trust, and the trustee deviates from the terms of the trust without having first obtained the permission or direction of the court to do so, the trustee is not liable to the beneficiary if the court subsequently approves such deviation.

"If the trustee deviates from the terms of the trust without first obtaining the permission or direction of the court, he does so at his own risk; when the propriety of the deviation is doubtful, the doubt is to be resolved by the court and not by the trustee."

See also Winthrop v. Attorney General, 128 Mass. 258, 261 (1880).

[3] G.L., c. 204, §27, provides in part: "A power of appointment, whether or not coupled with an interest, . . . and whether the power is held by the donee in an individual or in a fiduciary capacity, may be released, wholly or partially, by the donee thereof, unless otherwise expressly provided in the instrument creating the power. . . . [T]he term power of appointment includes all powers which are in substance and effect powers of appointment regardless of the language used in creating them and whether they are: (a) general, special, or otherwise; (b) in gross, appendant, simply collateral, in trust, or otherwise. . . ."

§2.12. [1] For the history of this bequest see Higginson v. Turner, 171 Mass. 586, 51 N.E. 172 (1898); City of Boston v. Doyle, 184 Mass. 373, 68 N.E. 851 (1903); City of

apprentices and the hope was expressed that no part of the fund remain uninvested or diverted to other purposes. At the end of one hundred years the trustees were to expend a sum of money for public works and the remainder of the fund "I would have continued to be let out at interest in the manner above directed for another hundred years . . ." At the end of two hundred years the fund was to be divided in specified shares between Boston and Massachusetts.

No loans had been made to apprentices since 1886 and the trust fund had been fully invested in other ways since that time. In 1894, an amount of money required to be laid out at the end of the first hundred years was paid to the city of Boston. This money, together with an equal sum given by Andrew Carnegie, was used in the establishment and equipment of the Franklin Technical Institute, a technical school operated by the Franklin Foundation.

In 1958, the legislature enacted a statute[2] providing that both Boston and the Commonwealth of Massachusetts were authorized to pay their share of the funds for the use of the Franklin Technical Institute if the Supreme Judicial Court should authorize such payment and termination. With the market value of the fund about $1.5 million in February, 1959, the Franklin Foundation brought a bill in equity to "implement" the 1958 statute.

The Supreme Judicial Court, in *Franklin Foundation v. Attorney General*,[3] saw no good reason to exercise its authority in equity to terminate the trust. It recognized that the need for expanding technical institute education was imperative in these times and that it was impossible to employ the fund in loans to young apprentices. However, it pointed out that Franklin had another major purpose — to make a gift to Boston and the state at the two hundredth anniversary of the fund. The termination of the trust could not be compelled since a continuation of the trust was necessary to carry out a material purpose.

In *Anna Jaques Hospital v. Attorney General*[4] the doctrine of cy pres was applied when the specific desires of a donor to a charity could not be fulfilled. There a testator left the residue of his estate to a certain hospital in trust to be used for the purchase of medicines, instruments, and equipment for the hospital. When it became impracticable for the hospital to continue its operations, its assets, including the trust fund, were transferred to another hospital in the same city. The Court emphasized the fact that there was no provision for a gift over on the failure of the trust and expressed its approval of the modern tendency to find a general charitable purpose when particular stated purposes become impracticable or impossible.[5]

Boston v. Curley, 276 Mass. 549, 177 N.E. 557 (1931); Franklin Foundation v. City of Boston, 336 Mass. 39, 142 N.E.2d 367 (1957).

2 Acts of 1958, c. 596.

3 340 Mass. 197, 163 N.E.2d 662 (1960).

4 1960 Mass. Adv. Sh. 887, 167 N.E.2d 875.

5 See 4 Scott, Trusts §399 (2d ed. 1956); see also 2 Restatement of Trusts Second

§2.13. Power of appointment: Succession tax. When a power of appointment is exercised the donor is considered to be the source of the appointee's interest in the property subject to the power. The donee is the conduit through whom the property devolves and, in effect, he acts as agent of the donor in selecting the transferee and the terms of the transfer. Unless a succession tax statute provides otherwise, the impact of such an excise tax is on the receipt of the beneficial interest by the appointee from the donor.[1] Under the Massachusetts statute the tax due is based upon the relationship of the appointee to the decedent donor and the value of the property at the time the appointee becomes entitled to enjoy or possess the property.[2]

In *Curtis v. Commissioner of Corporations and Taxation*[3] the donee of a general testamentary power of appointment exercised the power by appointing the principal of a trust fund to the "executor of [her] will . . . to be . . . dealt with . . . as general assets of my estate." Her will then left the residue of her estate to a trustee in trust to pay the income to her sister for life with remainders over. The Commissioner of Corporations and Taxation certified as the tax due from the trust under the donor's will a sum based on the value of all of the appointed property as of the date of the donee's death computed at the statutory rate designated for the donee's relationship to the donor. The Supreme Judicial Court disagreed with the commissioner, concluding that those who receive appointive property take from the donor and not from the donee and that the disposition was a succession taxable only in the donor's estate. It was not considered significant that the donee disposed of the property by two steps — appointment to her estate followed by a residuary bequest — instead of by one step through the residuary clause. The Court thought that the commissioner's stand would emphasize form over substance.

In another instance the mode of exercise of a power of appointment has had far-reaching legal consequences. Under the doctrine of "capture," the "blending" of the donee's individually owned assets with the subject matter of the power has resulted in the distribution of the appointive assets among the donee's next-of-kin when the attempted appointment failed.[4] However, an appointment to the donee's estate

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§399, Comment *i*, which provides in part: "The court can fairly infer an expectation on the part of the settlor that in course of time circumstances might so change that the particular purpose could no longer be carried out, and that in such a case the settlor would prefer a modification of his scheme rather than that the charitable trust should fail and the property be distributed among his heirs who might be very numerous and only remotely related to him."

§2.13. 1 3 Restatement of Property §333; 5 American Law of Property §23.24 (Casner ed. 1952); Emmons v. Shaw, 171 Mass. 410, 50 N.E. 1033 (1898).

2 G.L., c. 65, §§1, 13.

3 340 Mass. 169, 163 N.E.2d 151 (1959).

4 Amerige v. Attorney General, 324 Mass. 648, 660-663, 88 N.E.2d 126, 133-135 (1949); Fiduciary Trust Co. v. Mishou, 321 Mass. 615, 622-627, 75 N.E.2d 3, 8-11 (1947).

and a residuary gift out would not validate gifts under the rule against perpetuities when a one-step appointment would be invalid.[5]

If the commissioner had prevailed in the *Curtis* case the way would have been opened for a second tax being imposed on the devolution of the same property to the appointees. Without intimating as to the constitutional validity of such a double excise, the Court felt that a clear legislative mandate should be present before such adverse tax consequences attach to "form" rather than "substance."

§2.14. Scope of power to consume principal. The scope of a power to invade principal for the benefit of a life beneficiary was considered in two cases decided in 1960. The first, *Pittsfield National Bank v. United States,*[1] decided by the United States District Court for the District of Massachusetts, turned to local law[2] to determine whether a power to consume principal was a general power of appointment for estate tax purposes.[3] A trust beneficiary, who was entitled to income for life "together with all or such part of the principal of the same as he may from time to time request, he to be the sole judge of his needs," was held to have a power limited by an ascertainable standard.

Under Massachusetts law a "power to sell, mortgage, or otherwise dispose of so much of my estate as in [the life beneficiary's] judgement shall be necessary for her comfortable support and maintenance without securing a license therefor from the Probate Court" has been held to be a limited power.[4] When the residue of an estate was left to trustees in trust to pay the income to the testator's wife for life "for the support and maintenance of herself, and the care, maintenance and education of our children" it was decided that the income received by the wife was subject to reasonable support of herself and the children and that which was not needed for such reasonable support was held by her as her own property free of the trust.[5] An income beneficiary's power to dispose of principal, "whenever in his judgement he may deem it conducive to his comfort to do so" has been held to be a

[5] Fiduciary Trust Co. v. Mishou, 321 Mass. 615, 75 N.E.2d 3 (1947); compare Union and New Haven Trust Co. v. Taylor, 133 Conn. 221, 50 A.2d 168 (1948).

§2.14. [1] 181 F. Supp. 851 (D. Mass. 1960).

[2] "Neither the statute nor the Regulations create a new federal standard, and the charitable deduction cases also have had to turn to local law for determinations of the measurability of powers of invasion of principle." Id. at 853. See Blodget v. Delaney, 201 F.2d 589 (1st. Cir. 1953); Gammons v. Hassett, 121 F.2d 229 (1st Cir. 1941).

[3] 26 U.S.C. §2041(b)(1) (1958) defines a general power of appointment as "a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that — (A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment."

[4] Nunes v. Rogers, 307 Mass. 438, 30 N.E.2d 259 (1940).

[5] Johnson v. Johnson, 215 Mass. 276, 102 N.E. 465 (1913).

power limited by the standard of physical comfort and support.[6] *Blodget v. Delaney*[7] concluded that a power to invade corpus for "the comfort and welfare" of a beneficiary authorized expenditures for his physical comfort and the assurance of the perpetuation of his established way of life.

On the other hand, in *Gammons v. Hassett*[8] a life beneficiary's power to invade corpus to the extent that she "may at any time and from time to time need or desire" was considered to be without any objective limits and rendered the value of charitable remainders unascertainable at the testator's death and thus prevented a charitable deduction from the gross estate. The word "desire" was the offending word.

The *Pittsfield National Bank* case seized upon the word "needs" in reaching its decision that the power was limited by an ascertainable standard. The court thought that "actual financial or physical necessity" must be shown before the power could be exercised.[9] If the power could have been exercised only for the satisfaction of the "needs" of a beneficiary, it is difficult to see how a controversy could arise. But, in *Pittsfield National Bank,* the will creating the power to invade provided that the income beneficiary was to be sole judge of his needs. The court did not specifically allude to these words that by themselves appear to make the discretion given the donee subject only to his subjective determinations, but it thought that the word "needs" would be without any significance if it did not limit the exercise of the power.[10]

The other case decided in Massachusetts involving the scope of the power to consume principal was *Maher v. Kezer.*[11] A testator left the residue of his estate in trust "[t]o allow Agnes S. Kezer, who has so well and faithfully cared for me and my home for many years, to have the free use and income of my homestead . . . and the income of all my remaining personal property during her lifetime." The trustees were authorized to use the principal "of said personal property" for Agnes' comfortable support and maintenance and the keeping of the homestead in good repair. The trustees were also given the power to

6 Homans v. Foster, 232 Mass. 4, 121 N.E. 417 (1919); Stocker v. Foster, 178 Mass. 591, 60 N.E. 407 (1901).

7 201 F.2d 589 (1st Cir. 1953).

8 121 F.2d 229 (1st Cir. 1941).

9 See Lincoln v. Willard, 296 Mass. 549, 6 N.E.2d 774 (1937).

10 Compare Merchants National Bank of Boston v. Commissioner of Internal Revenue, 320 U.S. 256, 64 Sup. Ct. 108, 88 L. Ed. 35 (1947), in which an admonition that a trustee "exercise its discretion with liberality" in invading corpus for the benefit of an income beneficiary was emphasized by the Court in reaching a decision that an estate tax charitable deduction was lost because the charitable remainder was not "presently ascertainable." However, in that case the trustee could invade corpus "at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or *happiness* of my said wife . . ." (Emphasis supplied.) See 1 Restatement of Trusts Second §187, Comment *j*.

11 340 Mass. 263, 163 N.E.2d 298 (1960).

sell both the real and personal estate and were directed to hold the proceeds as part of the trust to be expended "under the same rules and conditions as apply to the rest of the trust fund." Upon the death of Agnes the fund was to be paid to a hospital. The trustees sold the homestead and sought instructions as to whether they could invade the principal derived from the sale of real estate for the comfortable support and maintenance of Agnes.

The Court decided that the proceeds from the sale of the homestead could be used for the support and maintenance of Agnes. It was observed that it was apparent that she was the primary object of testator's bounty. The phrase in the will stating that the proceeds derived from the sale of the realty "shall become and be held as part of this trust and expended under the same rules and conditions as apply to the rest of the trust fund," when construed with the rest of the will, manifested an intent that these proceeds be treated in the same manner as the personal property.

The doctrine of equitable conversion could not be applied because the will did not direct the trustees to convert the real estate into personalty; it merely authorized such conversion.[12] Under the general rule a sale of land by a trustee under a power of sale impresses upon the proceeds the character of real estate in so far as the dispositive rights of beneficiaries are concerned.[13] The Court, however, departed from the ordinary rule because it was not consonant with the testator's expressed wishes.

§2.15. Remainders: Preference for early vesting. The general policy favoring a construction of a remainder as vested instead of contingent was employed to resolve an ambiguous limitation in *Old Colony Trust Co. v. Tufts*.[1] A testator disposed of a major portion of his residuary estate in varying amounts to ten named individuals. The bequests to nine of them provided in each instance that in case the legatee "shall predecease me" his share was to go to "his issue . . . by right of representation." The gift to the tenth, who had no issue, was to lapse "in case that she shall predecease me." Another part of the residue was left in trust under which the trustee was to pay the income to two beneficiaries, "and upon the decease of said survivor, then to pay the principal of the trust to those then entitled to receive the other shares of the . . . residue . . . of my . . . estate under the terms of this will, paying to each a share proportionate to the share he or she is entitled to of said . . . residue . . . under the terms of this will."

[12] Gray v. Whittemore, 192 Mass. 367, 384, 78 N.E. 422, 429 (1906); compare Baker v. Commissioner of Corporations and Taxation, 253 Mass. 130, 148 N.E. 593 (1925).

[13] See Whitman v. Huefner, 221 Mass. 265, 108 N.E. 1054 (1915); Gray v. Whittemore, 192 Mass. 367, 78 N.E. 422 (1906); Holland v. Cruft, 3 Gray 162, 180-181 (Mass. 1855).

§2.15. [1] 1960 Mass. Adv. Sh. 991, 168 N.E.2d 86.

All of the individual residuary legatees survived the testator. At the date of termination of the trust three of the residuary legatees were living; and the others had died, six of them leaving issue.

A majority of the Supreme Judicial Court held that the trust fund was to be paid proportionately to the three surviving residuary legatees and the estates of the seven deceased legatees. The Court relied upon the preference for early vesting of future interests when it perceived no manifestation of a contrary intent; and it noted that because of the adopted construction no implication of words became necessary.

The word "then" appearing in the limitation disposing of the principal caused difficulty. "Then" introducing a gift over after a life estate may or may not make the remainder contingent, depending upon context. A direction that a trustee pay "income to B for life and *then* pay the principal to C" does not create a contingent remainder in C. The word "then" appears to be either a conjunctive or an indication of the time of distribution of principal rather than a manifestation of an intent to postpone the vesting of C's interest.[2] On the other hand, a gift to B for life and upon B's death remainder "to the children of B then living" gives B's children a contingent interest only; "then" refers to the point of time that the children have to survive in order to take.[3]

In *Tufts* the word "then" appears twice in the sentence providing for the gift of the principal of the trust — "*then* to pay the principal of the trust to those *then* entitled to receive the other shares of the residue. . . ." (Emphasis added.) It was the second "then" in the phrase "to those then entitled" that might have been construed to make evident a desire to postpone vesting until the time of distribution of the trust corpus. It was thought, however, that the phrase referred to the possibility that a legatee might have died before termination of the trust so that his personal representative would take his share of the remainder.

The decision of the *Tufts* case leads to the substantial inconvenience that results whenever distribution must be made to estates of the deceased named residuary legatees. Many of these estates would have to be reopened with all the attending delays and incommodities. Because of these impractical consequences and the thought that the average testator may be more concerned with identifying the objects of his bounty at the time of distribution of the property than the technicalities of the law of vesting of nonpossessory property interests, the case may be criticized. Such criticism, however, would be based primarily on the doubt that the rule preferring early vesting of remainder in-

[2] See Barker v. Monks, 315 Mass. 620, 626, 53 N.E.2d 696, 699 (1944); Gilman v. Congregational Home Missionary Society, 276 Mass. 580, 584-585, 177 N.E. 621, 622-623 (1931).

[3] See Dunton v. Lyons, 322 Mass. 542, 78 N.E.2d 497 (1948); Sears v. Brown, 241 Mass. 523, 135 N.E. 874 (1922); compare Harding v. Harding, 174 Mass. 268, 271, 54 N.E. 549 (1889).

terests is wise rather than a denial of the applicability of the rule to the case.[4] It has been suggested that the preference for early vesting has little justification for its existence today.[5]

§2.16. Legislation. Chapter 287 of the Acts of 1960 amends the Workmen's Compensation Law, G.L., c. 152, §33, to provide that an insurer shall pay reasonable burial expenses up to the amount of $1000 when death results from injuries covered by workmen's compensation.

Chapter 118 of the Acts of 1960, amending G.L., c. 191, §10, increases from one dollar to five dollars the fee payable to the register of probate for the deposit and safekeeping of a will.

Chapter 179 of the Acts of 1960 provides for the validation of acts of an executor, administrator, guardian, conservator, or trustee performed after the entry of a decree appointing him and before the expiration of the period allowed for appeal therefrom in cases in which no appearance against appointment has been entered, or if entered has been withdrawn, notwithstanding the fact that an appeal may have been taken within the period.

[4] See Old Colony Trust Co v. Clemons, 332 Mass. 535, 540, 126 N.E.2d 193, 196 (1955).

[5] See 5 American Law of Property §21.3 (Casner ed. 1952); 1955 Ann. Surv. Mass. Law §2.13; but compare 3 Restatement of Property §243, Comment *i*.